86-290

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT H. ALLPHIN, et al.,

Petitioners,

v.

WILLIAM J. BENSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell v. Forsyth*, ____ U.S. ____, 105 S.Ct. 2806 (1985), state officials are immune from suit under the Civil Rights Act for damages resulting from actions taken in response to a former employee's disclosure of confidential information obtained in the course of his employment, where no case has held such disclosures protected by the First Amendment.

2. Whether former government employees have an absolute right under the First Amendment to disclose confidential information obtained in the course of their employment.

PARTIES BEFORE THE COURT OF APPEALS

Petitioners, Robert H. Allphin and George T. Rummel, were the only appellants before the court of appeals. The sole appellee now, William J. Benson, is the respondent herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Robert H. Allphin and George T. Rummel, respectfully pray that a writ of certiorari issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 786 F.2d 268. The district court's order and findings, which were not reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1986. The court of appeals denied petitioners' timely petition for rehearing by order entered on April 11, 1986. This petition for certiorari was filed within ninety (90) days of the denial of the rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution Of The United States, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTES INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper pro-

ceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Illinois Revised Statutes (1975), Ch. 120, § 453.10(b)

All information received by the Department from returns filed under this Act, or from any investigation conducted under this Act, shall be confidential, except for official purposes, and any person who divulges any such information in any manner, except in accordance with a proper judicial order or as otherwise provided by law, shall be guilty of a Class B misdemeanor.

Nothing in this Act prevents the Director of Revenue from publishing or making available to the public the names and addresses of persons filing returns under this Act, or reasonable statistics concerning the operation of the tax by grouping the contents of returns so that the information in any individual return is not disclosed.

Nothing in this Act prevents the Director of Revenue from divulging to the United States Government or the government of any other state, or any officer or agency thereof, for exclusively official purposes, information received by the Department in administering this Act, provided that such other governmental agency agrees to divulge requested tax information to the Department. Also, nothing in this Act prevents the Director of Revenue from divulging for exclusively official purposes information received by the Department in administering this Act to the Multistate Tax Commission conducting an audit under Article VIII of the Multistate Tax Compact or the government of any other member state participating in such an audit.

The furnishing upon request of the Auditor General, or his authorized agents, for official use, of returns filed and information related thereto under this Act is deemed to be an official purpose within the meaning of this Section.

STATEMENT OF THE CASE

This Petition for Certiorari seeks review only of that portion of the court of appeals' judgment (attached in full at App. A) regarding the claim of respondent for damages under the Civil Rights Act arising from actions* by the petitioners, the former Illinois Director of Revenue and his Associate Director, in 1976 after respondent's state employment had been terminated (App. A-21). Petitioners allegedly acted in response to respondent's public disclosure of information he obtained while a Department of Revenue employee, including information regarding the prosecution of tax collection cases, alleged destruction of tax records and alleged improper compromise of tax liabilities (App. A-3-6).

The respondent claimed at trial that these actions by petitioners violated respondent's rights under the First Amendment. The district court entered judgment on directed verdict in favor of petitioner Rummel and a judgment notwithstanding the verdict in favor of petitioner Allphin on that claim.

The court of appeals vacated those judgments and remanded this claim for a new trial (App. A-24-26). The court of appeals fully recognized the qualified immunity extended to discretionary acts of top-level government employees by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), where such actions do not violate clearly established law (App. A-14-17). The court also recognized that

* According to the court of appeals, these actions were: 1) refusal to pay for the defense of respondent in certain pending suits; and 2) communications regarding the respondent to the Internal Revenue Service, and the Social Security Administration (App. A-5-6).

this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and subsequent cases, mandated a balance between the interests of state employees in public expression and that of the State as employer in the efficiency of government in determining whether an employee's speech was protected under the First Amendment (App. A-16-17).

However, the court concluded that with respect to respondent's claim of post-discharge retaliation, the actions of the petitioners were not entitled to the *Harlow* immunity. This conclusion was predicated solely on the premise that because respondent was no longer an employee of the Department of Revenue, the State no longer had any interest with respect to respondent's speech and, "[t]hus, the interests of the state, identified in *Pickering* that relate to efficiency, drop out of the calculus for the most part." (App. A-21).

This issue was raised *de novo* by the decision of the court of appeals, was not urged by respondent and thus could not have been addressed by petitioners. As a result, petitioners filed a Petition for Rehearing addressed solely to this point (App. D). There, petitioners argued that:

1) The *Harlow* immunity protected their discretionary decisions which did not violate "clearly established" law (App. D-3-6).

2) Respondent's post-discharge conduct, which allegedly triggered petitioner's actions, consisted solely of disclosure of information obtained by respondent as an employee of the Department of Revenue in violation of a specific state confidentiality statute (App. D-5).

3) Under "clearly established" law, as set forth in *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972)

such disclosures of confidential information were not protected by the First Amendment (App. D-4).

4) The State's interest in the confidentiality of tax information does not "drop out" merely because the person divulging it is no longer a state employee (App. D-4).

The court of appeals denied the Petition for Rehearing without analysis (App. B-1-2).

REASONS FOR GRANTING CERTIORARI

I.

THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH, AND THREATENS TO SUBSTANTIALLY ERODE, THE QUALIFIED IMMUNITY CREATED BY *HARLOW*.

The court of appeals concluded that petitioners were not entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), solely because their actions were taken when respondent was no longer a governmental employee. If the court of appeals applied *Harlow*, it must have concluded that a former employee's public disclosure of confidential tax information prohibited by statute was protected by the First Amendment under "clearly established" law to reach the result it did. However, the court did not so state and cited no case of any court "clearly establishing" that a former employee's right to disclose confidential information was absolute under the First Amendment. In fact, such a right was not "clearly established" in 1976, and is not clearly established now. For that reason, the court of appeal's decision is in direct conflict with this Court's mandate in *Harlow* and must be reversed.

Our research has disclosed only one case decided prior to 1976, the time of the alleged civil rights violation, which addressed the extent of First Amendment protection of disclosures of confidential information by former government employees. That case, *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), squarely held that a former government employee did not have a First Amendment right to disclose confidential information obtained during the course of his employment that was not already in the public domain.

In rejecting Marchetti's claim, the court noted that although the First Amendment protects criticism of the government, nothing in the Constitution requires the government to divulge information. *Id.* at 1316. Moreover, although Marchetti signed a secrecy agreement, the court noted that had the agreement not existed, one would probably have been imposed as a matter of law. *Id.* The fact that an agreement existed, however, buttressed the government's interest in the protection of classified information from unauthorized disclosure. *Id.*

No such secrecy agreement existed in the case at bar. Rather, the state's interest in confidentiality was declared by statute which expressly provided in 1976, at the time of petitioner's actions, that:

> All information received by the Department from returns filed under this Act, or from any investigation conducted under this Act, shall be confidential except for official purposes, and any person who divulges any such information in any manner, except in accordance with a proper judicial order or as otherwise provided by law, shall be guilty of a Class A Misdemeanor. Ill.Rev.Stat. (1975), Ch. 120, § 453.10(b).

This legislative mandate, based upon the need for confidentiality in Department of Revenue investigations, is as

clear a directive of government interest in nondisclosure of investigative information as the agreement in *Marchetti*. *See, Martin v. Lauer*, 686 F.2d 24, 34 (D.C. Cir. 1982): the government's interest in nondisclosure is generally greater when a specific statute prohibits dissemination of information. Indeed, in *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980), this Court noted that government restrictions on the disclosure of confidential information by former employees were enforceable in the absence of express agreement.

In 1976, existing law under *Marchetti* therefore recognized no clear First Amendment right of former government employees to divulge to the public confidential information obtained in the course of their employment. As a result, under the dictate of *Harlow v. Fitzgerald, supra*, petitioners were entitled to qualified immunity on respondent's post-discharge claim.

However, instead of applying *Harlow*, the court of appeals rendered a decision which flies in its face. By expanding the First Amendment in a civil rights damages case, the court abandoned "clearly established law" as the basis for immunity in direct derogation of this Court's mandate in *Harlow*. Further, by deciding a substantive question of constitutional law, and then retroactively applying it to create a damage claim, the court of appeals did exactly what this Court said could not be done in *Mitchell v. Forsyth*, ____ U.S. ____, 105 S.Ct. 2806 (1985). In *Mitchell*, this Court reaffirmed its holding in *Harlow* noting that qualified immunity was intended to allow government officials to avoid the cost of trial in cases where the legal norms allegedly violated were not clearly established at the time, regardless of subsequent development of the law. *Id.* at 2815-16. As this Court noted:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. *Id.* at 2816.

As demonstrated by this Court's decision in *Mitchell*, if a legal question is still "open" at the time of a public official's actions, under *Harlow*, qualified immunity should attach regardless of whether the law subsequently changes proscribing such conduct. The court of appeal's determination of the issue of qualified immunity is in clear disregard of that directive because, at best, whether respondent's speech was protected by the First Amendment was an open question in 1976.

By deciding that question, the court of appeals therefore undermined this Court's espoused purpose in creating a purely objective immunity test in *Harlow*. There, this Court expressly rejected the subjective "intent" element which previously existed under *Wood v. Strickland*, 420 U.S. 308 (1975), because it proved incompatible with the admonition in *Butz v. Economou*, 438 U.S. 478 (1978), that insubstantial claims against government officials based on the discharge of their official duties should not proceed to trial. This Court noted that trials centering on the intent of discretionary employees' conduct can be "peculiarly disruptive of effective government." 457 U.S. at 818.

The court of appeals departed radically from this Court's *Harlow* decision and, in doing so, imposed an impermissible burden on discretionary employees—the burden of anticipating how a court may choose to expand existing constitutional protections before it does so. That burden will

be equally disruptive, precluding efficient discharge of discretionary duties by government officers and substantially impairing the effectiveness of government.

Certiorari is thus warranted to cure the conflict caused by the court of appeals' determination of the question of qualified immunity and to bring this case in harmony with this Court's decisions in *Harlow* and *Mitchell*. Without this Court's review, public officials will be unnecessarily subject to suit for their discretionary acts in contravention of this Court's directive in *Harlow*.

II.

REVIEW IS NECESSARY BECAUSE THE COURT OF APPEALS' HOLDING, THAT DISCLOSURE OF CONFIDENTIAL INFORMATION BY A FORMER GOVERNMENT EMPLOYEE WAS CLEARLY PROTECTED BY THE FIRST AMENDMENT, CONFLICTS WITH A DECISION OF THIS COURT AND WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

The court of appeals' decision must necessarily be read as holding that it was and is clearly established law that a former government employee has an absolute First Amendment right to disclose confidential information. This result is in direct conflict not only with the decision of this Court in *Snepp v. United States*, 444 U.S. 507 (1980), but with decisions of the courts of appeals on this issue. Certiorari is therefore mandated and reversal of the court of appeals' decision is warranted.

Snepp concerned a former CIA agent's attempt to publish confidential information he had gathered in the course of his employment. In finding Snepp's post-termination conduct unprotected, this Court noted that even in the absence of an express confidentiality agreement, the government had a substantial interest in confidentiality

and could impose reasonable restrictions on its employees' activities which in other contexts could be protected by the First Amendment. *Snepp* at p. 509, n.3.

Petitioners' interests in maintaining the confidentiality of their investigations in the present case are equally compelling and respondent's status as a former employee, contrary to the view of the court below, did not diminish those interests in the least. The state's interest in the confidentiality of Department of Revenue investigations is multifaceted. Confidentiality encourages full disclosure, avoids embarrassment to taxpayers and ensures that investigations into alleged violations can proceed orderly and expeditiously, resulting in the state's fiscal well being and ability to provide for the health and welfare of its citizenry. The premature public disclosure of investigative information could frustrate ongoing investigations, result in losses of revenue to the state, and erode the public trust. Those interests are not dependent upon whether or not the person divulging such confidential information is a present or former employee, when the information disclosed was obtained in the course of state employment. As noted by the Court of Appeals for the District of Columbia in *Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982):

> Legitimate government function . . . can be seriously harmed if confidential information is disseminated. For example, disclosure of investigative files might forewarn a violator and allow him to escape arrest or indictment. Similarly, publication of certain economic information, such as a Securities and Exchange Commission decision to suspend trading in a certain corporation's stock, might provide some parties with an unfair advantage if released early. Revelation of the proceedings of legitimately confidential government hearings or meetings might disrupt decision-making, since officials might then be afraid to air

> their true views. Finally, dissemination of defense secrets might cause loss of lives or endanger safety. *Id.* at p. 34, *citing* Comment, *First Amendment Standards for Subsequent Punishment of Dissemination of Confidential Government Information,* 68 Cal. L.Rev. 83, 87 (1980).

This Court has repeatedly held that the interest of a governmental employer in efficiency must be weighed against the interest of the employee as a citizen to arrive at a balance which defines the scope of speech protected by the First Amendment. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Connick v. Myers,* 461 U.S. 138, 157 (1983). In the instant case, the court of appeals concluded, without citation to any authority, that when post-termination claims relating to First Amendment violations are made, "the interests of the state identified in *Pickering* that relate to efficiency drop out of the calculus for the most part." (App. A-21).

By concluding that the *Pickering* calculus does not apply to an ex-employee, the court of appeals held that the speech of a former governmental employee is entitled to the same protection as that of a citizen who has never been a state employee. That conclusion is premised on the erroneous assumption that the state has no legitimate interest in the speech of a former employee. However, Illinois has by statute declared its interest in the secrecy of tax information of the type divulged by respondent irrespective of the identity of the person disclosing that information. That declaration is predicated on the obviously legitimate state interest in the effective operation of its tax system, which would be seriously impaired by wholesale disclosure of tax information by ex-employees.

Therefore, the *Pickering* balancing test is as relevant to post-discharge questions as it is to pre-termination questions. The interests of the government in confidentiality remain constant in either case. As noted in *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984):

> *Snepp* demonstrates that the government may regulate the use of confidential information it supplies a citizen. The extent of permissible regulation depends upon the balancing of the government interest in confidentiality and the individual's interest in free expression. Regardless of how that balance is struck in any given case, it remains certain that a citizen's right of free expression of confidential information received directly from the government is not unfettered. Rather, this right is qualified and must be balanced against the government's legitimate interest in controlling the use of information it dispenses. *Id.* at 1027.

See also McGehee v. Casey, 718 F.2d 1137, 1142 (D.C. Cir. 1983), balancing test employed to determine that the CIA's censorship of ex-agent's writings did not violate the First Amendment.

The court of appeals clearly erred in concluding that the disclosure of confidential information by respondent, a former government employee, was clearly protected by the First Amendment. That ruling is in conflict with this Court's decision in *Snepp* and with the decisions of other courts of appeal. Certiorari is therefore mandated to reverse the lower court's decision and to restore harmony among the circuits.

CONCLUSION

For the reasons mentioned above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2186

WILLIAM J. BENSON,

Plaintiff-Appellee,

v.

ROBERT H. ALLPHIN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 3713—**Thomas R. McMillen**, *Judge.*

ARGUED APRIL 16, 1985—DECIDED MARCH 10, 1986

Before BAUER, ESCHBACH, *Circuit Judges*, and PELL, *Senior Circuit Judge.**

ESCHBACH, *Circuit Judge.* The plaintiff, a former state employee, alleged in this § 1983 action (1) that the defendant state officials discharged him in retaliation for the exercise of his First Amendment rights and (2) that, after his discharge, the defendants conspired to harass him in violation of his First Amendment rights. The primary questions presented on appeal are (1) whether the district

* Judge Pell heard oral argument and participated in the voting conference immediately following oral argument, but terminated his participation in this case on December 31, 1985.

court erred in granting a directed verdict to one of the defendant state officials on the ground that the plaintiff failed to present sufficient evidence to implicate the official in the alleged post-termination conspiracy and (2) whether the district court erred in granting a judgment notwithstanding the verdict to another state official on the ground that the official was qualifiedly immune. For the reasons stated below, we will vacate the directed verdict, vacate the judgment notwithstanding the verdict in part, and remand for a new trial on the remaining claim.

I

This appeal presents another chapter in the dispute between the plaintiff, William Benson, and certain officials of the State of Illinois. An earlier decision of this court, *Benson v. Scott*, 734 F.2d 1181 (7th Cir.) ("*Benson I*"), *cert. denied*, ____ U.S. ____, 105 S. Ct. 435 (1984), involved a related lawsuit filed against the former Illinois Attorney General and the former Illinois First Assistant Attorney General. In view of our disposition of this appeal, an extended discussion of the evidence presented at the fourteen-day trial is unnecessary. In addition, because the plaintiff is appealing from the district court's grant of a directed verdict for defendant Rummel and a judgment notwithstanding the verdict for defendant Allphin, we must review the evidence in the light most favorable to the plaintiff. *Cf. Mathews v. Fairman*, 779 F.2d 409, 415 (7th Cir. 1985).

Considering the evidence in this manner, the following facts emerge: Benson was employed by the Illinois Department of Revenue ("DOR") from 1971 until his dismissal in 1976. On November 1, 1974, Benson entered into a one-year written contract with the DOR to "undertake projects requiring personal and technical services as assigned by the [DOR] concerning pending investigations for the [DOR]." The contract was terminable at will by either party upon written notice. The parties entered into a similar contract that commenced November 1, 1975,

and expired on June 30, 1976. Benson was terminated on June 24, 1976, six days before the second contract was to expire of its own accord.

Benson was initially assigned to assist in the enforcement of the Illinois Cigarette Tax Act, codified at Ill. Rev. Stat. ch. 120, ¶¶ 453.1 to .22 (1975) and the Illinois Cigarette Use Tax Act, codified at *id.*, ¶¶ 453.31 to .51 (referred to collectively as "Tax Act" or "Act")[1] at the Illinois-Indiana border.[2] Benson lived in South Holland, Illinois, which is not far from the Indiana border, and worked out of a squad room on LaSalle Street in Chicago.

In the latter part of 1971, the DOR placed certain cigarette stands in Indiana under surveillance where it could observe individuals purchasing cigarettes and then transporting them into Illinois without paying the appropriate tax. After assuming the position of Director of the DOR in the latter part of March 1973, defendant Robert Allphin adopted a policy of arresting Tax Act violators and confiscating their vehicles. Benson and his partner, James Kelleher, were involved in the enforcement of this policy. Benson made numerous arrests. He also took photographs of individuals allegedly violating the Tax Act. These photographs were said to include pictures of Chicago police officers, Chicago firemen, and other state, county, and city employees engaged in violations of the Act. Benson retained the negatives of these photographs.

Benson maintained that, from 1974 until the time of his termination, he was ordered not to enforce the Tax Act against state, county, and city employees, especially Chicago police officers. He discussed this matter extensively with his supervisors and co-workers. In addition,

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[1] Both acts have now been consolidated as the Illinois Cigarette Use Tax Act, codified at Ill. Rev. Stat. ch. 120, ¶¶ 453.1 to .67 (1984).

[2] Benson was also involved in the enforcement of laws relating to retailer occupation taxes, motor fuel oil taxes, as well as bingo and lottery activities.

Benson informed his supervisors and co-workers that he had taken photographs of Tax Act violations and that he had retained the negatives.

Benson also criticized the DOR's tax-collection policy, and maintained that collection suits were being settled for unacceptably low amounts.[3] Apparently only Allphin and defendant Rummel (the Associate Director of the DOR) were authorized to settle these suits. Benson maintained further that certain taxpayers were making payoffs to DOR personnel in order to escape prosecution.

After Benson discussed his grievances with Allphin and Rummel in the latter part of 1975 and the early part of 1976, his duties at the DOR were changed, in that he was ostensibly assigned in January 1976 to a continuing investigation into the improprieties he had alleged were taking place within the DOR. Allphin and Rummel also told Benson to report only to them, and not to come to the DOR office in Chicago.

Allphin and Rummel instructed Benson not to reveal any investigatory information to the public. However, because he was dissatisfied with the manner in which his superiors were handling the investigation, Benson discussed his allegations with reporters from the *Chicago Tribune* and *Hammond Times* in February or March of 1976. Benson also turned over some of his photographs to a reporter in June 1976. As a result of these disclosures, several stories regarding Benson's allegations appeared in the press in March 1976; another series was published in August 1976 after Benson was terminated.

After Benson made these disclosures to the press, Allphin and Rummel tried to keep a tighter rein on him. He was again told not to discuss these matters with anyone outside the DOR. Several meetings were arranged, however, between Benson (along with other DOR person-

[3] It should be noted that Benson was not involved in the collection of the disputed taxes.

nel) and the Internal Affairs Division of the Chicago Police Department in the spring of 1976. At these meetings, Benson was allowed to discuss the alleged selective enforcement problem and his surveillance photographs. Despite these meetings, Benson still believed that the DOR was not acting in good faith and that his superiors were attempting to cover up the allegations. In early June 1976, he indicated to DOR personnel that he might make further disclosures of his allegations to the public and press. Allphin and Rummel decided that Benson's services were no longer needed, and terminated him on June 14, 1976.

During this same period, Benson and other DOR personnel had become embroiled in federal litigation challenging the DOR's enforcement of the Tax Act. Benson was named as a defendant in several of these civil-rights actions. In addition, an Illinois state trial court in April 1974 had enjoined the enforcement of the Act at the Illinois-Indiana border against persons who purchased cigarettes for their personal consumption and not for resale. The DOR, nonetheless, continued its enforcement activities, and as a result was held in contempt in December 1975 by the Illinois state trial court. Benson had testified on behalf of the DOR at the 1975 contempt proceedings. On July 21, 1976, as his relationship with his employer was deteriorating, he filed an affidavit with the state trial-court judge. In the affidavit, he stated that he had been told by his superiors at the DOR to disregard the April 1974 injunction and to distort his testimony at the contempt hearing. Benson claimed further that DOR records had been destroyed and that others had been withheld or altered in violation of the state court's production order. He also discussed the alleged selective enforcement problem.

The Illinois Attorney General sent a letter to Allphin, dated September 2, 1976, which indicated that the State of Illinois, because of conflicts of interest, was withdrawing its representation of the DOR defendants, including Benson, in eight civil-rights suits pending in federal district courts. Allphin and Rummel decided to provide representation at the Department's expense to all DOR de-

fendants except Benson. In addition to withdrawing legal representation for Benson, Allphin and Rummel maintained a campaign of harassment against their former employee. For example, they caused information to be sent to the Social Security Administration and the Internal Revenue Service to encourage investigations of Benson. The reason for these adverse actions against Benson was Allphin and Rummel's dissatisfaction with Benson's disclosures within the DOR, to the press, and to the judiciary.

Benson filed this § 1983 action against Director Allphin and Associate Director Rummel in October 1977. Count I of the amended complaint alleged that, after Benson's termination, Allphin and Rummel conspired to harass him in retaliation for exercising his free-speech rights. Count II alleged that Benson was in fact terminated from his position at the DOR in retaliation for exercising his free-speech rights. The case finally came to trial in October 1983. The court dismissed Rummel as a defendant pursuant to his directed-verdict motion filed at the close of Benson's case-in-chief. At the close of the trial, the jury found in favor of Benson and against Allphin on both counts. It awarded Benson $350,000 for the retaliatory discharge and $3,000 for the failure to provide legal representation after the discharge. Allphin filed motions for a judgment notwithstanding the verdict and for a new trial.

The trial court issued a somewhat ambiguous order in ruling on Allphin's post-trial motions. The court first found that, on the basis of the evidence presented, a reasonable jury could conclude that Benson was terminated in retaliation for his "attempted exercise of the right of free speech" and that Allphin's proffered business justification for the termination was a pretext. The court went on to conclude that, under the Supreme Court's decisions in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983) and *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), Allphin, as a high ranking government official performing discretionary functions, was entitled to qualified immunity from civil damages. The court found that Benson was exercising his free-speech rights primarily with

reference to two matters: (1) the allegedly low settlements by the State of Illinois of large claims for delinquent sales or use taxes in contested cases brought and settled by Allphin and his legal advisors and (2) the refusal of Allphin to permit the arrest of Chicago police officers who were apparently buying cigarettes in Indiana and bringing them into Illinois without payment of the required tax. While the court acknowledged that these may be matters of public concern, it also found that their disclosure undermined Allphin's authority and control over his office.

With reference to the low settlements, the court found that Benson did not have an unqualified right to speak out on this matter and that Allphin's efforts to maintain confidentiality were required under Ill. Rev. Stat. ch. 120, ¶ 453.10b (1975). In the court's opinion, Allphin's interest in the proper functioning of his office outweighed Benson's First Amendment interests in this regard.

With reference to the selective enforcement, the court noted that Allphin allowed Benson to bring the matter to the attention of the Chicago Police Department and that the DOR took steps to remedy the problem. With reference to the disputed photographs, the judge found that these were compiled as part of an investigatory file and that Benson was not privileged to disclose them to the press. The court also relied on ¶ 435.10b to support this conclusion. According to the court, Allphin acted in the best interests of the state by requiring that Benson go to the police department, rather than the press, with these allegations.

Thus, the trial court found that Allphin had imposed reasonable restrictions on Benson's expression and also added that (although the question was never presented to the jury) there was "no evidence in the record to support a jury finding that defendant as a reasonable person under all the circumstances would have known that his termination of plaintiff's contract would violate any clearly established constitutional right."

The court then held that damages could not be recovered in this case because they were barred by the Eleventh Amendment. Under Illinois law, because there was no evidence of willful or wanton conduct on the part of Allphin, the state would be required to indemnify him. *See* Ill. Rev. Stat., ch. 127, ¶ 1302. The trial court reasoned that this was in fact a recovery of damages from the sovereign, which the Eleventh Amendment prohibits.

In considering the alternative motion for a new trial, the court found that the damage award was excessive. The trial court indicated that, but for the defendant's qualified immunity and the Eleventh Amendment's bar to recover, it would have set aside the verdicts and ordered a new trial, because the jury's decision appeared to be a product of passion and prejudice. In the court's opinion, a fair award would be $50,000 plus attorney's fees under 42 U.S.C. § 1988.[4] The court then vacated the jury's verdict and entered judgment in favor of the defendant as a matter of law. It then stated, "Alternatively, if both parties waive appeal, a consent judgment will be entered in favor of the plaintiff for $50,000 plus attorney's fees and costs." The parties, predictably enough, did not agree to such a waiver. This appeal followed.

II

A. *Motion for Judgment Notwithstanding the Verdict*

We will first consider a procedural point raised in the proceedings below. Prior to trial, the defendants filed motions for summary judgment in which they asserted a defense of qualified immunity. These motions were denied.

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[4] The trial court's opinion does not clearly indicate whether it would order a new trial on both liability and damages, or damages alone. However, both sides have interpreted the court's order as calling for a new trial on both issues, and we agree. Thus the $50,000 award (especially in view of the court's rulings on immunity and the Eleventh Amendment) appears to be no more than an indication of a reasonable settlement offer.

At the close of the plaintiff's case, the defendants moved for a directed verdict on several grounds, one of which was the defense of qualified immunity. This defense was initially rejected.[5] Counsel for Allphin, the only remaining defendant at the close of the trial, also offered a jury instruction on qualified immunity, but this instruction was properly rejected by the trial court.

Counsel for Allphin, however, failed to move for a directed verdict at the close of all evidence. The jury retired to deliberate on Friday, October 28, 1983. On Monday, October 31, 1983, Allphin's counsel attempted to make a directed-verdict motion. The district court stated that it would take the matter under advisement and "decide it after the case is finished as a post-trial motion." The court's next statement, however, was that the jury had reached a verdict on liability, but that they had not yet determined the amount of damages.

After the jury returned verdicts for the plaintiff, Allphin moved for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b) and, in the alternative, for a new trial under Fed. R. Civ. P. 59(a). In his Rule 50(b) motion, Allphin again asserted a defense of qualified immunity. The district court ultimately concluded that Allphin was immune and entered a verdict in his favor.

On appeal, the plaintiff argues that the defendant's failure to move for a directed verdict at the close of all the evidence constituted a waiver under Fed. R. Civ. P. 50(b) to seek a judgment notwithstanding the verdict.[6] We disagree.

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[5] In response to the directed-verdict motion, however, the district court dismissed Rummel as a defendant on the ground that the plaintiff had not demonstrated that there had been a conspiracy.

[6] We reject Allphin's argument that he was in "technical compliance" with Rule 50(b). It would stretch the notion of liberal construction of the Federal Rules beyond recognition to conclude that Allphin was in compliance with the letter of the rule when he offered a directed-verdict motion after the jury had initiated its

(Footnote continued on following page)

Fed. R. Civ. P. 50(b) provides in relevant part:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . . [A] party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict.

Rule 50(b) is not a model of perspicuity. For example, the motion for a directed verdict mentioned in the second sentence above in fact refers to the motion described in the previous sentence. Thus, one learns from the notes of the Advisory Committee on the 1963 amendments to the rule that "[a] motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence."[7]

There are two rationales for the requirement of a motion for directed verdict at the close of all the evidence as a predicate to a motion for judgment notwithstanding the verdict. The first has its roots in the constitutional right to a jury in a civil action. Judgment by directed verdict existed in 1789; judgment notwithstanding the verdict did not. Thus, a final judgment that is contrary to the jury's verdict might run afoul of the Seventh Amendment unless it is considered a reserved decision on an earlier

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[6] *continued*
deliberations and had reached an informal verdict on liability. The district court also recognized this, and stated that it would treat the motion for directed verdict as a post-trial motion. *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018 (5th Cir. 1979), is not to the contrary, as the putative directed-verdict motion in that case was made before the jury had begun to deliberate. *Id.* at 1026.

[7] A motion for directed verdict is not required as a predicate for a motion for a new trial.

motion for directed verdict.[8] *See McKinnon v. City of Berwyn*, 750 F.2d 1383, 1388 (7th Cir. 1984); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2522 (1971). The second rationale involves pragmatic concerns: the motion for directed verdict at the close of all the evidence provides the nonmovant with an opportunity to do what he can to remedy the deficiencies in his case (by for example seeking to reopen his case-in-chief, altering his cross-examination of his opponent's witnesses, or offering further evidence in rebuttal to his opponent's case) before the jury retires to deliberate. *McKinnon*, 750 F.2d at 1388; *Ohio-Sealy*, 585 F.2d at 825.[9]

The text of Rule 50(b) admits of no exceptions. However, in response perhaps to the opacity of the rule and in an effort to base its decisions on substantive grounds,

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[8] The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

For a discussion of the current scope of the jury right under the Seventh Amendment, see *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. Chi. L. Rev. 581, 606-13 (1984).

[9] Two other reasons for the requirement of a directed-verdict motion prior to a motion for judgment notwithstanding the verdict were noted in *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1024 (5th Cir. 1979). First, a litigant should not be able to gamble on a jury verdict and later challenge the sufficiency of the evidence on appeal. Second, a litigant who has not moved for a directed verdict must consider the evidence sufficient to go to the jury, and should not then impute error to the trial judge for sharing that view. These concerns are not present in the instant case, because Allphin did attempt to move for a directed verdict challenging the sufficiency of the evidence before he could have known that the jury had reached a verdict.

rather than procedural defaults, this circuit has allowed something less than a formal motion for directed verdict to preserve a party's right to move for judgment notwithstanding the verdict. *See, e.g., Johnson v. University of Wisconsin-Milwaukee*, No. 85-1358, slip op. at 4 (7th Cir. Jan. 29, 1986); *Bonner v. Coughlin*, 657 F.2d 931, 938 (7th Cir. 1981); *Ohio-Sealy*, 585 F.2d at 825; *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 576-77 (7th Cir. 1976). Unless Seventh Amendment questions are presented, the requirements of Rule 50(b) are not strictly enforced provided the prevailing party's failure to renew the motion for directed verdict did not unduly prejudice his opponent. *McKinnon*, 750 F.2d at 1389-90.

In the instant case, the Seventh Amendment considerations discussed above are of no moment, because the question of qualified immunity is addressed to the court, not the jury. *See Mitchell v. Forsyth*, ___ U.S. ___, 105 S. Ct. 2806 (1985); *Harlow*, 457 U.S. at 818-19, 102 S. Ct. at 2738-39; *Bates v. Jean*, 745 F.2d 1146, 1151 (7th Cir. 1984). Thus, a judgment notwithstanding the verdict on this ground in no way invades the province of the jury.[10]

As for the pragmatic considerations discussed above, Benson on appeal addressed the question of prejudice only in his reply brief to this court, where he points out that Allphin referred to the Illinois confidentiality statute, Ill. Rev. Stat. ch. 120, ¶ 453.10b (1975), for the first time in the post-trial briefs. Benson's first argument is that he was unduly prejudiced by this late reference, because he could have otherwise presented evidence to show that Allphin's reliance on the confidentiality statute was a pretext and that the statute did not apply to the materials re-

[10] It should be noted that the defense of qualified immunity is typically determined by motions under Fed. R. Civ. P. 12 or 56 and that these decisions on the immunity defense are immediately appealable. *See Mitchell v. Forsyth*, ___ U.S. ___, 105 S. Ct. 2806 (1985).

leased.[11] Benson does not, however, indicate what evidence he would have presented. His second argument is that the confidentiality statute is a defense and, therefore, that it should have been raised at the pleading stage.

We disagree with both contentions. First, the issue of qualified immunity is one for the trial court, not the jury. Thus, Benson could have attempted to present his evidence regarding pretext or applicability to the trial judge. He has not indicated that he attempted to do so. In addition, the defense of qualified immunity involves an objective, not subjective, standard to analyze the actions and knowledge of the defendant. *See Harlow*, 457 U.S. 800, 102 S. Ct. 2727; *see also, Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012 (1984). Thus, an inquiry into Allphin's actual state of mind is not appropriate under *Harlow*; the only question is whether his actions were objectively reasonable. In addition, as we understand Allphin's argument concerning ¶ 453.10b, he relies on this provision only as a declaration of the State of Illinois's interest in confidentiality. This statute is a part of the "state of the law" the court will consider in determining whether the defendant is entitled to immunity.

Second, Allphin's defense is qualified immunity, not ¶ 453.10b. While it would have been preferable for Allphin to have referred to the provision prior to the post-trial briefs, we do not understand how the late citation to ¶ 453.10b could have unduly prejudiced Benson when the trial court would in any event take judicial notice of statutory enactments[12] and when the defense at issue is one that was decided by the court on the basis of the post-trial submissions of both parties.[13]

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[11] Counsel for Benson clarified this contention at oral argument, and stated that he would show that ¶ 453.10b did not cover *all* of the materials Benson released. This is, of course, an implicit concession that it did cover some of the materials.

[12] *See McCormick on Evidence* § 335 (3d ed. 1984).

[13] Benson's argument of prejudice is severly weakened by the fact that, after Allphin had mentioned ¶ 453.10b in his initial post-trial brief, Benson did not even discuss the provision in his brief in opposition.

To summarize, Allphin's failure to move for directed verdict at the close of all the evidence did not foreclose the presentation of a qualified-immunity defense in his motion for judgment notwithstanding the verdict.[14]

B. *Qualified Immunity*

As government officials performing discretionary functions, Allphin and Rummel are shielded from liability for civil damages in a § 1983 action unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738; *see also Davis*, 468 U.S. at ____ n.12, 104 S. Ct. at 3020 n.12 (immunity standard of *Harlow* applies in § 1983 actions).

Although the Supreme Court has articulated the rule for qualified immunity, it has not fully explained what it means by the phrase "clearly established statutory or constitutional rights." First, it has not specified which court one must look to in determining whether a right is "clearly established," *see Harlow*, 457 U.S. at 818 n.32, 102 S. Ct. at 2738 n.32.[15] It seems obvious, however, that reli-

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[14] As the discussion above indicates, however, Allphin is precluded from challenging the sufficiency of the evidence. In any event, Allphin has conceded that the evidence was sufficient to show that Benson was discharged for his expression.

[15] A similar problem exists in other areas of the law. For example, the federal judiciary, when interpreting legislation, has at times relied on congressional "acquiescence" or "silence" in the face of previous judicial or administrative decisions to devine the meaning of a provision. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 599, 103 S. Ct. 2017, 2033 (1983). In order to make any sense, congressional silence must be considered an analogue to an "admission by silence." *See McCormick on Evidence* § 270 (3d ed. 1984) (discussion of admission by silence). Before a party's failure to speak may be used as an admission, it must be shown that the statement was "heard" by him. *Id.* In construing congressional silence, however, the courts have not indicated the level of the judicial or administrative process Congress is "listening" to.

ance on Supreme Court decisions alone might be inappropriate (unless they are the only cases ruling on the question), because they are infrequent in comparison to the decisions of the district and appellate courts, and this infrequency could have the practical effect of converting qualified immunity into absolute immunity.[16]

Second, although it has stated that government officials are not "charged with predicting the future course of constitutional law," *Pierson v. Ray*, 386 U.S. 547, 557, 87 S. Ct. 1213, 1219 (1967), the Court has not explained how close the factual correspondence must be between the actions under consideration and the decisions that establish the applicable law. Its decision in *Mitchell v. Forsyth*, ____ U.S. ____, 105 S. Ct. 2806 (1985), suggests, however, that officials are not required to anticipate the extension of existing legal principles.

These two considerations may not strongly influence the outcome of this appeal, however, because it would appear that there is one type of constitutional rule, namely that involving the balancing of competing interests, for which the standard may be clearly established, but its application is so fact dependent that the "law" can rarely be considered "clearly established." In determining due-process requirements for discharging a government employee, for example, the courts must carefully balance the competing interests of the employee and the employer in each case. Thus, the Supreme Court has consistently stated that one can only proceed on a case-by-case basis and that no all-encompassing procedure may be set forth to cover all situations. *See, e.g., Davis*, 468 U.S. at ____, 104 S. Ct. at 3018-19; *see also Benson I*, 734 F.2d at 1184-85. It would appear that, whenever a balancing of interests is required, the facts of the existing caselaw

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[16] Of course, if there is a conflict among the circuits, one must await the definitive resolution by the Supreme Court.

must closely correspond to the contested action before the defendant official is subject to liability under the *Harlow*.[17] With *Harlow*'s elimination of the inquiry into the actual motivations of the official, *see* 457 U.S. at 815-19, 102 S. Ct. at 2736-39, qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required.[18]

In the instant appeal, *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968), and its progeny provide the standard by which Benson's First Amendment claims as a public employee must be analyzed. In *Pickering*, the Court stated that the problem was to arrive at a balance between the interests of the plaintiff, as a citizen, in commenting on matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.* at 568, 88 S. Ct. at 1735; *see also Connick*, 461 U.S. at 140, 103 S. Ct. at 1686. The Court was at pains to point out that, in view of the "enormous variety of fact situations" in which critical statements by public employees may be thought by their superiors to furnish grounds for dismissal, it was not "appropriate or feasible to attempt to lay down a general standard" for resolv-

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[17] As noted in *Murray v. Gardner*, 741 F.2d 434, 440 n.2 (D.C. Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1748 (1985):

> Government officials must be granted the ability to pass unmolested through bogs of murky legal precedent. They must not become prey to every hypothesis of what the law might have come to forbid had it eventually developed along certain lines. When the law is clear, and an official's duties delineated, then he will not be able to rely on the immunity defense. But we must not and do not demand that every government official become skilled in guessing the future path of the law.

Cf. Davis v. Scherer, 468 U.S. 183, ____ n.13, 104 S. Ct. 3012, 3021 n.13 (1984).

[18] There may, of course, be a situation in which the defendant's actions are so egregious that the result of the balancing test will be a foregone conclusion, even though prior caselaw may not address the specific facts at issue.

ing the free-speech claims of public employees and that it could only "indicate some of the general lines along which an analysis of the controlling interests should run." *Pickering*, 391 U.S. at 569, 88 S. Ct. at 1735. As the Supreme Court noted in *Connick*, 461 U.S. at 150, 103 S. Ct. at 1692, the particularized balancing required by *Pickering* is difficult even for the judiciary to accomplish. Therefore, while it may have been clear since 1968 that a citizen does not forfeit his First Amendment rights entirely when he becomes a public employee, the scope of those rights in any given factual situation has not been well defined. *Cf. Connick*, 461 U.S. at 150, 103 S. Ct. at 1692.

The specific question presented in this case is whether it was clearly established in the first part of 1976 that the actions of defendants Allphin and Rummel violated Benson's First Amendment rights.[19] Benson's expressions,

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[19] As noted above, *Harlow* eliminated the inquiry into the actual motivation of government officials. The Court, however, has not explained how this objective standard is to be employed when the plaintiff's claim depends on the state of mind of the defendant officials. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S. Ct. 285, 291-92 (1976) (violation of Eighth Amendment requires showing of deliberate indifference); *Washington v. Davis*, 426 U.S. 229, 238-41, 96 S. Ct. 2040, 2046-48 (1976) (Fourteenth Amendment requires showing of discriminatory intent). *Cf. Daniels v. Williams*, ___ U.S. ___, 106 S. Ct. 662 (1986) (state official's negligent act causing unintended loss of or injury to life, liberty, or property does not implicate Due Process Clause).

The state of mind of Allphin and Rummel is important in this appeal to the extent that it bears upon the causation requirement set forth in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977). At oral argument, however, the defendants conceded that the evidence was sufficient to show that their actions were primary motivated by Benson's expressions both inside and outside the DOR.

As previously noted, the issue of qualified immunity is typically resolved before trial. The question may be decided even after a trial, in which case objective factors are still the only legitimate focus of the inquiry. *See Bates v. Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984).

for the purposes of the *Pickering* balancing test, must be divided into three categories: (1) his discussions with his co-workers and supervisors within the DOR prior to his termination, (2) his disclosures to the press prior to his termination, and (3) his disclosures to the press and others after his termination.[20]

(1) As for Benson's in-house expressions prior to his termination, this court's decision in *Egger v. Phillips*, 710 F.2d 292 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983), is controlling. In *Egger*, we stated that, until the Supreme Court's 1979 decision in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S. Ct. 693 (1979), it was an open question whether on-the-job expressions of public employees were entitled to constitutional

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[20] This third category relates to the claims of Count I. Allphin maintains that the denial of legal representation claim was dismissed from the case prior to trial. We disagree. The due-process claims relating to the denial of legal representation were dismissed, but not the First Amendment claims. In an order dated July 6, 1983, the trial judge to whom the case was assigned stated that the issue of the denial of representation "may still be in the case as an alleged overt act of conspiracy."

There is still some confusion as to the status of these claims at the trial. In ruling on the defendants' motion for directed verdict at the close of the plaintiff's case, the district court seemed to retain the post-termination claims, but then directed Rummel out of the case because of insufficient proof of a conspiracy. However, the claim that Benson was denied representation in retaliation for his expression was submitted to the jury. Nonetheless, the district court made no specific reference to this claim in ruling on the post-trial motions. The court stated in its ruling that Allphin did not contest the jury award for Count I, when in fact the award was contested in Allphin's post-trial motions.

We do not need to resolve this confusion in view of our rulings that (1) the directed verdict for Rummel was improper and (2) a new trial must be conducted on the claim of Count I. In addition, in view of the Supreme Court's decision in *Mitchell v. Forsyth*, ___ U.S. ___, 105 S. Ct. 2806 (1985), we will determine whether the defense of qualifed immunity is available to Allphin and Rummel for the post-termination activities. *See also Bates v. Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984).

protection. 710 F.2d at 315. *A fortiori*, constitutional protection for such expressions was not clearly established in 1976. Allphin and Rummel are, therefore, entitled to immunity under *Harlow* for those claims relating to Benson's pre-termination, in-house expression.

(2) As for Benson's disclosures to the press prior to his termination, the answer is not as straightforward, but we ultimately conclude that the defendants are immune, because it was not clearly established in the first half of 1976 that discharging an employee in Benson's position violated the First Amendment. We note that *Pickering* provides protection to public employees who are speaking out on matters of public concern.[21] There is no serious dispute that Benson's charges of wrongdoing and corruption went beyond a personal dispute about internal DOR matters, and could qualify as matters of "public concern." However, even speech involving matters of public concern can legitimately lead to adverse employment action. *See Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1258 (7th Cir. 1985). A court must consider the factors identified in the *Pickering* line of cases, *e.g.*, whether the expression would create problems in maintaining harmony among co-workers or discipline by immediate supervisors, whether the employment relationship is one for which personal loyalty and confidence are necessary, whether the expression could lead to controversy and conflict among officials, and whether the matter was one on which debate was vital to informed decisionmaking. *See, e.g., Patkus*, 769 F.2d at 1258. There are special concerns in the area of law enforcement that allow for greater restrictions on the expression of public employees. *See Zook v. Brown*, 748 F.2d 1161 (7th Cir. 1984); *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir. 1984); *Benson I*, 734 F.2d 1181; *Egger*, 710 F.2d 292. It is also important to know whether the employee's position provides him with a special ex-

[21] The requirement that the expression be related to a matter of "public concern" was further developed in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983).

pertise on the matters at issue. *See Pickering*, 391 U.S. at 571-72, 88 S. Ct. at 1731. In addition, the presence or absence of rules, regulations, and statutes is important in striking the balance. *Cf. Connick*, 461 U.S. at 153 n.14, 103 S. Ct. at 1693 n.14; *Zook*, 748 F.2d 1161; *Jurgensen*, 745 F.2d 868; *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17 (2d Cir. 1979); *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979).

The decisions cited above, many of which were decided *after* 1976, show that it was not clearly established in 1976 that it would be improper to attempt to keep the matters Benson was discussing within the DOR and the Chicago Police Department, and, therefore, to discharge him when he made disclosures to the press.[22] An accommodation of the factors listed above is difficult for the judiciary to accomplish in a consistent manner, *Egger*, 710 F.2d at 314; it blinks reality to expect the defendants to have accomplished this task more effectively than the courts in 1976.

The conclusion that the defendants' actions were objectively reasonable is strengthened by the confidentiality provision codified at Ill. Rev. Stat., ch. 120, ¶ 453.10b (1975).[23] *Cf. Connick*, 461 U.S. at 153 n.14, 103 S. Ct. at 1693 n.14; *Zook*, 748 F.2d 1161. This statute does not conclusively determine the scope of the state's interest under

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[22] In 1976, the primary Supreme Court cases that dealt with the First Amendment rights of public employees were *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968), and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972). Both of these decisions identified, but did not extensively analyze, the employer's potential interest in confidentiality and in maintaining harmony among the employees.

[23] In 1976, ¶ 453.10b stated in relevant part:

> All information received by the [DOR] from returns filed under this Act, or from any investigation conducted under this Act, shall be confidential, except for official purposes, and any person who divulges any such information in any manner, except in accordance with a proper judicial order or as otherwise provided by law, shall be guilty of a Class B misdemeanor.

the First Amendment;[24] it does, however, represent a declaration of the state's interest, and was binding on the plaintiff and the defendants. In view of the fact that the validity of ¶ 453.10b has never been challenged, it is difficult to see how the defendants could conclude that they were violating the clearly established First Amendment rights of the plaintiff in 1976 for what amounts to insubordination in violating state law.[25] *Cf. Jurgensen*, 745 F.2d 868 (violation of regulation constitutes insubordination); *Johnson v. Brelje*, 701 F.2d 1201, 1210 (7th Cir. 1983) (no prior decisions on statute in question).

(3) As for Benson's disclosures to the press and others after his termination, our decision in *Benson I*, 734 F.2d at 1185-86, compels the conclusion that Allphin and Rummel are not entitled to immunity. In the instant case, Benson claims that he was denied legal representation as a result of his expression. It is true that Benson did not have a property interest (within the meaning of the Fourteenth Amendment) in those services. In *Benson I*, however, we concluded that, even if there is no right to a government benefit, the denial of that benefit may not be premised on an individual's exercise of his First Amendment rights. *Id.* at 1185. Furthermore, as noted in *Benson I*, the plaintiff was no longer in the employ of the DOR when he was denied legal representation. *Id.* at 1186. Thus, the interests of the state identified in *Pickering* that relate to efficiency drop out of the calculus for the most part. We conclude that, after *Benson I*, Allphin and Rummel are not immune to civil damages for those claims arising from their activities subsequent to Benson's termination.

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[24] *Cf. Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012 (1984).

[25] There are other confidentiality statutes that apply to DOR employees. *See, e.g.*, Ill. Rev. Stat., ch. 120, ¶¶ 453.50, 467.26, 478, 9-917 (1975). There are no reported court decisions in which the validity of these provisions has been placed into question.

We therefore affirm the district court's grant of judgment notwithstanding the verdict on the basis of qualified immunity for those activities of Allphin and Rummel that culminated in Benson's termination (i.e., Count II of the complaint). For those claims relating to the harassment of Benson after his termination (i.e., Count I), we find that the defendants are not immune.[26]

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[26] Some of our cases decided prior to *Mitchell v. Forsyth*, ___ U.S. ___, ___, 105 S. Ct. 2806, 2815-17 (1985), suggest that it is improper to dispose of a case solely on the ground that at the time of the alleged constitutional violation the right in question was not clearly established. Under these decisions, the court should conclusively determine whether a constitutional violation in fact occurred; otherwise, the status of such a right will be left "in limbo." *See Coleman v. Frantz*, 754 F.2d 719, 723 (7th Cir. 1985). However, *Mitchell* calls for a reconsideration of this practice, because it suggests that, once the court has determined that the official is immune, it should not go on to decide the merits of the plaintiff's claim.

This judicial restraint is, of course, consistent with the "case and controversy" requirement of Article III. Once the defendant is found to be immune from damages in an action where only damages are sought, a resolution on the merits neither aids nor hinders the parties involved in the specific case, but simply provides guidance for future litigation. Many areas of the law are rife with uncertainty, but the judiciary may not act as a roving commission that decides important questions when those questions are not properly presented in litigation.

The rationale given in the pre-*Mitchell* cases for reaching the merits was that the law would otherwise remain uncertain. Perhaps a parallel could be drawn to the "capable of repetition, yet evading review" exception to mootness. However, in the context of *Harlow*, this argument does not account for the fact that the question of qualified immunity arises when one files a *damage* action against an official in his individual capacity. The rights at issue will not necessarily "evade review," because they may be adjudicated, for example, in an action for declaratory or injunctive relief.

It is for these reasons that we express no opinion as to the merits of Benson's claims.

C. *Directed Verdict for Rummel*

At the close of the plaintiff's case-in-chief, the district court granted a directed verdict for Rummel on the ground that Benson had not shown that Rummel was involved in a conspiracy to harass Benson after his termination. Benson argues that this ruling was error, and we agree. The standard for granting a directed verdict is very generous to the nonmovant. The trial court must view the evidence and make all inferences in the light most favorable to the nonmoving party, and if reasonable jurors could differ on the conclusions drawn therefrom, the case must go to the jury. *See Mathews v. Fairman*, 779 F.2d 409, 415 (7th Cir. 1985). It is clear from our review of the record that the district court drew improper inferences in making this ruling. There was testimony presented up to that point in the trial that Rummel had been involved in the imbroglio at the DOR before and after Benson's termination and that both he and Allphin decided together not to provide legal representation to Benson after the Illinois Attorney General withdrew his representation in the civil-rights actions pending in federal district court.[27] We, therefore, vacate the grant of directed ver-

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[27] Allphin and Rummel contend on appeal that they cannot be held liable in the conspiracy alleged in Count I because Rummel was only providing legal advice to Allphin. Despite the defendants' claims to the contrary, our decision in *Lenard v. Argento*, 699 F.2d 874, 887 (7th Cir. 1983), does not hold that, as a matter of law, government attorneys are immune from liability for conspiracy in a § 1983 action.

We would, of course, be reluctant to hold that Rummel was liable if his sole role was the provision of legal advice in good faith. However, in this case the evidence strongly suggests that Rummel was acting as more than a legal advisor. In any event, the issue has not been properly presented on appeal, because Allphin and Rummel have not indicated to this court where they raised this issue below. *Cf. Graczyk v. United Steelworkers of America*, 763 F.2d 256, 261 n.6 (7th Cir.), *cert. denied*, ____ U.S. ____, 106 S. Ct. 335 (1985). We, therefore, express no opinion as to its resolution. Allphin and Rummel are free to pursue this issue on remand.

dict for Rummel, and remand for a new trial on the post-termination conspiracy in which Rummel was allegedly involved.

D. *Sovereign Immunity*

As noted in Section I, *supra*, the district court held that any damage recovery was barred by the Eleventh Amendment because, under Ill. Rev. Stat., ch. 127, ¶ 1302, Allphin would be indemnified by the state. This ruling is incorrect. As this court recently noted in *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985), which dealt specifically with ¶ 1302, "every court that has considered this issue has rejected, rightly in our view, the argument that an indemnity statute brings the Eleventh Amendment into play." Thus, that amendment does not bar recovery in this action.

E. *New Trial*

The district court conditionally granted Allphin's motion for a new trial. We wholly concur in this ruling. The damages are not supported by the evidence, and the verdicts are clearly a product of passion and prejudice. *Cf. Ustrak v. Fairman*, 781 F.2d 573, 578-79 (7th Cir. 1986). Only Count I of the complaint remains, however, and we will remand for a new trial on that count on the issues of both liability and damages.

III

For the reasons stated above, we (1) AFFIRM the judgment notwithstanding the verdict for defendant Allphin on Count II on the ground that he is immune from civil damages and find that defendant Rummel is also immune under that count, (2) VACATE the judgment notwithstanding the verdict for Allphin and the directed verdict for Rummel on Count I, and (3) REMAND for a new trial on Count I on the issues of both liability and damages. The parties shall bear their own costs on appeal.

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 10, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. WILBUR F. PELL, *Senior Circuit Judge*

WILLIAM J. BENSON,

Plaintiff-Appellee,

No. 84-2186 vs.

ROBERT H. ALLPHIN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-3713

Thomas R. McMillen, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, this Court (1) AFFIRMS the judgment notwithstanding the verdict for defendant Allphin on Count II on the ground that he is immune from civil damages and finds that defendant Rummel is also immune under that count, and (2) VACATES the judgment notwithstanding the verdict for Allphin and the directed verdict for Rummel on Count I, and (3) REMANDS for a new trial on Count I on the issues of both liability and damages, in accordance with the opinion of this Court filed this date. The parties shall bear their own costs on appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 11, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*

WILLIAM J. BENSON,

Plaintiff-Appellant,

No. 84-2186 vs.

ROBERT H. ALLPHIN, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 3713

Thomas R. McMillen, *Judge.*

ORDER

The opinion in the above-captioned case is amended to incorporate the following changes:

Page 5, line 11: The phrase "June 14, 1976" should read "June 24, 1976".

Page 5, beginning on line 23: The sentence "On July 21, 1976, as his relationship with his employer was deteriorating, he filed an affidavit with the state trial-court judge." should read "On July 21, 1976, after he had been terminated, Benson filed an affidavit with the state trial-court judge."

All judges on the original panel in the above-captioned case voted to deny the separate petitions for rehearing filed by the defendants-appellees and by the plaintiff-appellant.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM J. BENSON,

Plaintiff,

v. No. 77 C 3713

ROBERT H. ALLPHIN,

Defendant.

DECISION

Defendant Robert H. Allphin has filed a motion for judgment n.o.v. and has also filed an alternative motion for a new trial. Defendant is a former Director of Revenue of the State of Illinois and the plaintiff was a contract employee of that department during defendant's tenure. The complaint was based upon 42 U.S.C. § 1983 and the First Amendment to the Constitution of the United States. The jury rendered a compensatory verdict in favor of plaintiff on October 31, 1983 for $350,000. A separate verdict of $3,000 was returned for failure of defendant to provide legal counsel to plaintiff when he was sued civilly, but we do not understand this verdict to be contested.

It is undisputed that plaintiff's contract was terminated by defendant five days before it expired, after the defendant had caused an extensive investigation to be made concerning the plaintiff's activities during his employment. Plaintiff contended that he was terminated in retaliation for or in restraint of his right of free speech, in that he

was revealing to the press, and to co-employees, allegedly improper conduct attributable to the defendant in his official capacity. The evidence was conflicting concerning just what plaintiff's exercise of his right of free speech consisted of and just how this was interfered with by the defendant. We find that a reasonable jury could find that plaintiff was terminated in retaliation for his attempted exercise of the right of free speech, although there was no direct evidence of improper interference by defendant. A reasonable jury could also have found that defendant's business justification for the termination was pretextual, although there was no direct evidence of that either.

Since the evidence could support a verdict for plaintiff on the issue of liability, defendant's motion for judgment n.o.v. is based alternatively upon the qualified immunity conferred upon certain public officials, according to *Connick v. Myers*, ____ U.S. ____, 103 S.Ct. 1684 (Apr. 20, 1983); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).* On the facts of this case, we find and conclude that defendant is entitled to qualified immunity. As was said in *Connick v. Myers, supra*, at 103 S.Ct. at 1694:

> The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.

There can be no dispute that defendant Allphin was a high government official performing discretionary functions, including termination of contract employees for cause. There is no evidence that a reasonable person would believe that termination of plaintiff's employment

---

* On this point and others, plaintiff's counsel has called our attention to the decision in *Wm. J. Benson v. Scott, et al.*, ____ F.2d ____ (7th Cir. #83-1040, decided May 9, 1984). This decision is instructive for many reasons, including the advantage of a full-blown trial on sensitive issues, subject to post-trial motions.

in this instance would *violate* "clearly established statutory or constitutional rights," although defendant certainly is presumed to know that employees of his department have a qualified right to exercise free speech. So far as we can determine, the subject matters concerning which plaintiff exercised his right of free speech involved (1) allegedly low settlement by the State of Illinois of large claims for delinquent sales or use taxes in contested cases brought and settled by the defendant and his legal advisors, and (2) the refusal of the defendant to permit the arrest of Chicago police officers who were apparently buying cigarettes in Indiana and bringing them into Illinois without payment of the required tax. These may be matters of public concern, but their publication could also undermine defendant's authority and control over his office.

As to the first subject, plaintiff had no unqualified right of free speech, in our opinion. He was not a lawyer and his information about the cases which had allegedly been improperly settled was both hearsay and a matter completely beyond his limited responsibilities for the department. Defendant's desire to preserve the confidentiality of his internal files was not only supported by but was required by *Ill. Rev. Stat.* ch. 120, § 453.10b. Defendant's interest in disciplining plaintiff outweighed plaintiff's rights in this respect.

As to the second subject, plaintiff was permitted by the defendant to take his complaint to the Chicago Police Department concerning alleged violations of Illinois tax laws, and as a matter of fact the Chicago Police Department took appropriate action. Considerable controversy exists in the evidence concerning plaintiff's desire to release to the press certain photographs of the unfaithful police officers. The photographs were taken during plaintiff's performance of his duties for the Department of Revenue, but the police officers (and perhaps other public employees) were not assigned to enforce the State's tax laws. As we understand plaintiff's own testimony, the photographs were to be paid for by him, subject to reimbursement. Whether or not the photographs were paid

for by the State of Illinois or by the plaintiff subject to reimbursement does not change the fact that they were investigative work which he had no privilege to disseminate to the press. In fact they were protected by § 453.10b, referred to above. Plaintiff was attempting to exercise a right of free speech which was contrary to what his superior reasonably believed was in the best interest of the State of Illinois. Therefore, the defendant was justified in requiring the plaintiff to direct his complaint to the Chicago Police Department rather than to the press.

There was no evidence that defendant restricted plaintiff's right of free speech unreasonably or contrary to the best interest of the State of Illinois. As a matter of fact, it was in the interest of the State *not* to disclose publicly the allegedly illegal activities of Chicago police officers before their Department could make its own investigation and take appropriate action. Defendant was directing plaintiff's "whistle blowing" through proper channels, not stifling it completely. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Since plaintiff was not content to let the matter be processed in the normal manner, he was properly subject to discharge based on the law as applied to undisputed evidence. *Hochstadt v. Worchester*, 545 F.2d 222 (1st Cir. 1976).

We find no evidence in the record to support a jury finding that defendant as a reasonable person under all the circumstances would have known that his termination of plaintiff's contract would violate any clearly established constitutional right.

In support of a second alternative for judgment n.o.v., the United States Supreme Court has ruled that a judgment for money damages cannot be obtained against a sovereign state or its officials acting within the scope of their responsibilities, with some exceptions. *Edelman v. Jordan*, 415 U.S. 651 (1974); see also *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 463 (1945); *Owens v. Lash*, 682 F.2d 648 (7th Cir. 1982). Although this question was not submitted to the jury, defendant was sued in his official capacity and is indemnified by

state statute, *Ill. Rev. Stat.* ch. 127, § 1302(c) and (d). The rule in *Edelman*, based on the Eleventh Amendment to the Constitution of the United States, has recently been extended to violations of State laws, practices or policies. *Pennhurst State School v. Halderman*, ____ U.S. ____, 104 S.Ct. 900 (Jan. 23, 1984).

There is no evidence of "willful or wanton misconduct" by the defendant which would deprive defendant of the indemnification of § 1302. Nor, since *Harlow v. Fitzgerald, supra*, p. 5, does there seem to be much, if any, liability remaining for "subjective" misconduct short of intentional violations.

Defendant further contends, on his motion for judgment n.o.v., that plaintiff proved no actual damages. This is the state of the evidence insofar as it concerns the failure of the State to provide plaintiff with a defense in certain civil litigation (see plaintiff's memorandum filed Dec. 12, 1983, p. 14), but it is not correct insofar as the subjective effect of the violation of a constitutional right is concerned. This is an abstract, psychological damage which must be evaluated by the jury, and if the jury properly found that the plaintiff's constitutional right to free speech was violated or impaired by the defendant, he is not limited to nominal damages. *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981). Plaintiff did testify to emotional trauma, but his physical problems which were allegedly aggravated by defendant's actions were not supported by medical evidence. We will discuss the question of damages more fully in the next section of this Decision, where we believe it is more properly involved.

Alternative Motion For A New Trial

Defendant has also filed a motion for a new trial, alternatively, primarily on the grounds of an excessive verdict. On this alternative, the court can also grant a remittitur which, if accepted by the plaintiff, would avoid the expense and risk of a new trial. *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963 (7th Cir. 1983).

This court cannot justify the amount of the jury's verdict of $350,000. Plaintiff was working on a contract for $840.00 a month which, by some legerdemain, was supposed to constitute reimbursement of his expenses. Otherwise, he would not have been entitled to his disability pay from the federal government. Even assuming that he was being compensated at the net rate of $840.00 a month before taxes, his loss of income for five days can in no respect be related to the jury's verdict of $350,000. There is no showing that his future employment was interfered with.

As mentioned above, the remainder of his damages are intangible: whatever a reasonable jury could award for interference with the right of free speech and the resulting psychological trauma which might flow from this violation of a constitutional right. These intangible damages are difficult to prove and evaluate. cf. *Nekolny v. Painter, supra.* The violation of much more personal but less transitory constitutional rights in the so-called strip-search cases with which this court and our Court of Appeals has had considerable experience (when liability had been determined as a matter of law before the jury's verdict on damages) have resulted in awards ranging from $15,000 to $60,000, and other cases are being settled by the City of Chicago for intermediate amounts, sometimes under seal. To paraphrase a well-known statement by former Supreme Court Justice Stewart, we cannot define an excessive verdict in cases involving violation of intangible constitutional rights, but we know one when we see it.

Therefore, but for defendant's qualified immunity and the Eleventh Amendment defense, a proper remedy would be to set aside the verdicts and grant a new trial on the grounds of obvious passion and prejudice evidenced by the amount of the jury's verdicts. This passion or prejudice may have resulted from the jury's belief that defendant improperly settled certain large tax claims of the State (not supported by the evidence), or that certain telephone conversations of the plaintiff were surreptitiously audited by the defendant or his subordinates (a matter not claimed

as violation of any statutory or constitutional right), or by the intensive investigation of the plaintiff's official activities upon which his discharge was allegedly based (although no complaint was made by the plaintiff of this fact, either), or by the alleged refusal to defend plaintiff in civil litigation, or by some other subtle but unobserved fact or circumstance which occurred during the trial. In short, this court can only speculate as to the cause of the excessiveness of the verdict.

In our opinion, a fair and adequate award to the plaintiff should not exceed $50,000 plus his attorney's fees which would then follow under § 1988. From what we know of this case and of the plaintiff's claimed damages, we believe that both parties should accept this as a fair settlement award.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the jury's verdict and the judgment on the verdict entered in this case on October 31, 1983 are vacated and set aside, and judgment is entered in favor of the defendant as a matter of law. Alternatively, if both parties waive appeal, a consent judgment will be entered in favor of the plaintiff for $50,000 plus attorney's fees and costs. A Rule 58 judgment will be entered.

ENTER:

/s/ Thomas R. McMillen
Judge
United States District Court

DATED: June 14, 1984

APPENDIX D

[Cover omitted in printing]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2186

WILLIAM J. BENSON,

Plaintiff-Appellant,

vs.

ROBERT H. ALLPHIN, et. al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 3713

Honorable **Thomas R. McMillen**, *Judge Presiding.*

APPELLEES' PETITION FOR REHEARING

Introduction

This Court has found that defendants Robert Allphin and George T. Rummel were immune from liability under 42 U.S.C. §1983 with respect to their decision to terminate the State employment of plaintiff, William Ben-

son, because of speech which included disclosures of confidential Department of Revenue information. As a result, this Court affirmed the judgment notwithstanding the verdict in favor of Allphin and the directed verdict in favor Rummel on Count II of Benson's complaint. This Court concluded that defendants' actions were immune because Benson's speech was not protected by the First Amendment under clearly established law. Defendants wholeheartedly agree with these conclusions.

However, this Court also vacated the district court's directed verdict for Rummel and the judgment notwithstanding the verdict for Allphin pertaining to Count I of Benson's complaint, containing Benson's claim of post-discharge harassment.[1] Holding that defendants' decision not to provide state-supplied counsel for Benson in several civil rights cases in which he was a defendant, after he was no longer a state employee, was not immune, this Court ordered a new trial on Count I of the complaint. Defendants respectfully disagree with this aspect of the court's decision. Because Benson's post-discharge speech was not, under clearly established law, protected by the First Amendment, the actions of the defendants in response to that speech were immune.

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[1] The Court's opinion suggests that defendants' post-termination action also included sending information regarding Benson to the Internal Revenue Service and the Social Security Administration. (Slip Opinion at 6). However, the record affords no basis for this deduction nor were such acts alleged in Benson's complaint. Rather, the record demonstrates that Mr. Richard Dunn, a non-defendant, sent letters regarding Benson to these agencies but that such letters were unrelated to Benson's post-termination speech and were done on Dunn's initiative without input from Allphin or Rummel. (T. 354-356, 445-446). However, even assuming the involvement of Allphin and Rummel in these actions, neither action denied Benson a State-supplied benefit or privilege.

As A Former State Employee, Benson Did Not Have A Clearly Established First Amendment Right To Disclose Confidential Information Obtained In The Course Of His Employment.

As this Court noted in its decision, under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), government officials performing discretionary functions are shielded from liability for civil damages in §1983 actions unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818; Slip Opinion at 14. The standards for qualified immunity under *Harlow* and *Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806 (1985), as properly applied by this Court to Benson's discharge claim, also require the conclusion that it was not clearly established in 1976 that defendants' decision not to hire counsel for Benson at State expense violated Benson's First Amendment rights.

This Court's conclusion that the post-discharge decision by the defendants not to retain an attorney at state expense for Benson was not immune under *Harlow* is grounded on two propositions. First, this Court noted that denial of a state-supplied benefit cannot be premised on a citizen's exercise or surrender of his First Amendment rights. We agree.

However, this Court also concluded that because Benson was no longer an employee, the State had no legitimate interest in preventing his disclosure of confidential information gained while he was an employee. As a result, this Court concluded, the clearly established law did protect Benson's disclosures.

This Court thus decided that Benson's post-discharge speech was protected because, as an ex-employee, his First Amendment rights were the equivalent of those of a citizen who had never been a government employee. However, the clearly established law, as it existed in 1976 and exists today, is that an ex-employee's disclosure of confidential information learned while a government employee is not protected by the First Amendment.

To the contrary, the state of the law at the time of defendants' decision recognized that former employees have no First Amendment right to disclose confidential information obtained during the course of their employment. In *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir., 1972), cert. den. 409 U.S. 1063 (1972), the court expressly held that a former government employee could not, under the First Amendment, disclose classified information obtained during the course of his employment which was not already in the public domain. *Marchetti* was the guide that defendants were entitled to rely upon in 1976 and it remains the law today. Because Benson's disclosures were not clearly protected by the First Amendment, termination of Benson's state-supplied counsel clearly did not violate Benson's First Amendment rights.

This Court concluded that since Benson was no longer a State employee "the interests of the State identified in *Pickering* that relate to efficiency drop out of the calculus for the most part." (Slip Opinion at 21). However, Benson's status as a former public employee, divulging confidential information obtained in the course of his prior employment, placed him in a unique status to which traditional First Amendment law, as applied to citizens who have never been state employees, is inapplicable. Moreover, the termination of Benson's status as a State employee did not cause the State's interest in the confidentiality of the information Benson garnered while an employee to "drop out." The State's interest is in the confidentiality of tax investigation information to encourage full disclosure and to avoid embarrassment of taxpayers. That interest is not dependent on whether the person divulging tax information is currently an employee of the State.

In its opinion, this Court stressed that the objective reasonableness of the defendants' actions as well as the scope of the State's interest in confidentiality was demonstrated by the statutory enactments prohibiting disclosure of confidential Department of Revenue information:

> The conclusion that the defendants' actions were objectively reasonable is strengthened by the con-

> fidentiality provision codified at Ill.Rev.Stat., ch. 120, par. 453.10b (1975). This statute does not conclusively determine the scope of the state's interest under the First Amendment; it does, however, represent a declaration of the state's interest, and was binding on the plaintiff and the defendants. In view of the fact that the validity of par. 453.10b has never been challenged, it is difficult to see how the defendants could conclude that they were violating the clearly established First Amendment rights of the plaintiff in 1976 for what amounts to insubordination in violating state law. (Slip Op., pp. 20-21; Footnotes and citations omitted.)

Those same statutory provisions underscore the objective reasonableness of the defendants' post-discharge conduct to exactly the same extent as their pre-discharge conduct. In addition, the legislative history of the confidentiality statutes demonstrates that the State has expressly declared its interest in the confidentiality of the information, irrespective of the identity of the person disclosing it or his status as a former or present employee.

The statute, as it existed in 1976 and exists today, prohibited disclosure of confidential information by "any person." Therefore, Benson's post-discharge disclosures of confidential information starting in 1976 clearly violated this statute, the validity of which, as this Court noted, has never been challenged. Further, the State has specifically recognized the need to extend the protection of the statute beyond preventing disclosure by current employees. The statute, as originally enacted, prohibited disclosure of confidential information by "any officer or employee of such Department." The statute was amended, effective August 17, 1971, to apply to "any person" thus extending the scope of prohibition to former employees as well.[2]

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[2] The other confidentiality provisions cited by this Court, found at Ch. 120, pars. 453.50, 467.26 and 478, Ill.Rev.Stat., were similarly amended effective August 17, 1971 to apply to "any person." The confidentiality provision of Ch. 120, par. 9-917, Ill.Rev.Stat. applied to "any person" from its enactment.

Therefore, under *Harlow v. Fitzgerald, supra,* the defendants' post-discharge decision to deny Benson State-supplied counsel because of Benson's continued disclosure of confidential information was immune because it did not violate Benson's clearly established First Amendment rights. Accordingly, rehearing is appropriate and this Court should affirm the Court's grant of judgment notwithstanding the verdict and directed verdict based on Count I of the complaint.

CONCLUSION

For the reasons mentioned above, defendants respectfully request that rehearing be granted and that the District Court's judgment be affirmed in its totality.

Respectfully submitted,
BETAR & PETIT, P.C.
By /s/ Paul J. Petit
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FILED
AUG 11 1986
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CLERK

No. 86-29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT H. ALLPHIN and GEORGE T. RUMMEL,

Petitioners,

vs.

WILLIAM J. BENSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the right of public employees to be free from retaliation for their exercise of First Amendment rights was clearly established in 1976, thereby negating the Defendant's qualified immunity defense raised during and after trial especially since that defense had been rejected by the district court on three prior occasions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT H. ALLPHIN and GEORGE T. RUMMEL,

Petitioners,

vs.

WILLIAM J. BENSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The respondent WILLIAM J. BENSON (Benson), a former State Employee, alleged in this section 1983 action (1) that, the defendant State officials of the ILLINOIS DEPARTMENT OF REVENUE (DOR) retaliated and harassed him and on June 24, 1976, discharged him in violation of his First Amendment rights and (2) that, after his discharge, the Defendants conspired to and did harass him in violation of his First Amendment rights.

The original complaint in this case was filed on October 6, 1977 (R.1).[1] The district court's jurisdiction was invoked pursuant to 28 U.S.C. §1331 and §1343. The case proceeded to trial on Benson's Amended and Supplemental Complaint (R.77) on October 12, 1983. On October 31st, 1983, the jury returned verdicts in favor of Benson and against ROBERT H. ALLPHIN (Allphin) on both counts. They awarded Benson a total of $353,000.00 in damages (R.229A). A Rule 58 judgment was entered on those amounts.

The trial court entered a directed verdict at the close of Plaintiff's case in favor of GEORGE RUMMEL (Rummel) on the basis that Benson had failed to link Rummel to the alleged conspiracy (A.23).[2] It rejected however, the qualified immunity defense (R.217). On June 14, 1984, the court granted judgment notwithstanding the verdict to Allphin on the basis of the Eleventh Amendment and qualified immunity (C.2-3).

The Seventh Circuit reversed the directed verdict in favor of Rummel (A.23-24) and reversed in part the judgment in favor of Allphin. It then found that Allphin and Rummel were entitled to qualified immunity with respect to pre-termination harassment and the termination itself (A.22); it found that the petitioners were not entitled to qualified immunity with respect to the post termination harassment claims (A.22).

Benson has filed a Petition for Certiorari in this Court challenging the Seventh Circuit's findings with respect to

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[1] R. represents the record on appeal; the number refers to each specific item. T. refers to the trial transcript.

[2] A. refers to Appendix A of the Petition for Certiorari; B. Refers to Appendix B; C. refers to Appendix C.

the pre-termination claims (See No. 86-27, docketed in this Court on July 10, 1986). The Seventh Circuit's conclusion with respect to the post termination harassment is now before this Court on the instant petition.

Benson adopts, as his Statement of the Case, the statement contained in the opinion of the Seventh Circuit, which appears at A.2 through A.8 of the Petition, as supplemented by the Statement contained in Benson's Petition (No. 86-27) at 4-12.

It must be noted, that Allphin and Rummel had moved for summary judgment on the basis of qualified immunity three times prior to trial and once during the trial. The confidentiality statute and the release of confidential information were not mentioned in any of those motions. The district court rejected the asserted qualified immunity defense on July 16, 1982 (R.138), on April 5, 1983 (R.167), and continued the last motion until trial. At trial, the Defendant's qualified immunity defense was rejected for the third time (R.217).

Rummel never raised the confidentiality statute as a defense in the district court. Allphin raised it for the first time in his brief in support of post trial motions (R.239). His assertion of that defense was in direct conflict with the affidavits he had filed in support of one of the earlier motions for summary judgment. There, he had stated under oath that he did not know of and thus could not have been motivated by Benson's disclosures to the press and various law enforcement officials. See *Benson v. Allphin*, 544 F.Supp. 464 (N.D. Ill. 182) at 470. It was also in direct conflict with the trial testimony of Allphin, Rummel and each of their witnesses.

ARGUMENT

The issue in this Petition, when refined to its essence, does not warrant review on certiorari. The right of employees to be free from retaliation for their exercise of First Amendment rights has been clear at least since *Pickering v. Board of Education*, 391 U.S. 563 (1968). The First Amendment violations which Benson asserts occurred in 1975 and continued through 1981 and after.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) this Court held that whether an official may prevail in his or her qualified immunity defense depends upon the "objective reasonableness" of his or her conduct as measured by reference to clearly established law. In *Davis v. Scherer*, 104 S.Ct. 3012 (1984) this Court again emphasized that "no other circumstances are relevant to the issue of qualified immunity" *id.*, at 3016.

In a related case, *Benson v. Scott*, 734 F.2d 1181 (C.A. 7, 1984), *cert. denied*, 105 S.Ct. 435 the Seventh Circuit in applying this doctrine, stated:

> In determining whether the actions alleged by Benson violate clearly established law, however, the relevant legal framework is not the Illinois Indemnification Act, as the Defendants and the district court believed. Benson's claim is that the Attorney General violated his rights under the First Amendment. This claim does not require Benson to show that he had a right to reimbursement under the Act, for even where there is no right to a valuable government benefit, the denial of that benefit may not be premised on an employee's exercise of his First Amendment rights. (citations omitted). 734 F.2d at 1185.

The only relevant c nsideration on Benson's First Amendment claim is whether it was objectively reasonable for the Defendants to retaliate against Benson for his exercise of First Amendment rights. On this basis, the district court rejected petitioners' qualified immunity defense on 3 separate occasions.

It was not objectively reasonable in 1976 to retaliate against an employee for exercising his or her First Amendment rights. *Pickering, supra*; *Hostrop v. Board of Junior College, District No. 515*, 471 F.2d 488, 491-93 (7th Cir.), *cert. denied*, 411 U.S. 967 (1973).

The decision of the Seventh Circuit is in full accord with the principles expressed in decisions of this Court and those decisions of the Courts of Appeals which have had occasion to address this subject matter.

There is another basic and fatal flaw in the petitioners' argument. It proceeds upon the erroneous assumption that Benson was revealing confidential information which came within the purview of the State confidentiality statute. Ill.Rev.Stat., ch. 120, §453.10(b). There is simply no support in the record for that assumption.

Benson was in fact exposing instances of official misconduct and illegal activity by Allphin, Rummel and others in the DOR. The public disclosure of such information is not precluded by the State of Illinois nor by the DOR. Benson disclosed the selective enforcement of the State's cigarette tax laws against private citizens, but not against public servants, especially Chicago police officers.

Benson's disclosures also included instances where motor fuel oil and retailer occupation tax cases had been compromised for inordinately low amounts and where bribery of DOR officials had been implicated in the settlements.

Allphin and Rummel had ultimate authority over such settlements.

Following his termination, Benson submitted an affidavit to a Judge of the Circuit Court of Cook County detailing in addition the selective enforcement issue, the facts concerning the alteration and destruction of DOR records to prevent that Judge from reviewing them during contempt proceedings which had involved Allphin. Rummel was also implicated in that obstruction of justice as set forth in Benson's affidavit.

Allphin and Rummel conspired to harass and silence Benson, to discredit him and destroy his credibility. Among their actions were attempts to have the INTERNAL REVENUE SERVICE and SOCIAL SECURITY ADMINISTRATION institute investigations of Benson (A.6). They also ordered the withdrawal of legal representation from Benson (A.5-6). They were successful in each of those efforts.

The State of Illinois has a statutory policy which rendered the conduct of Allphin and Rummel a class 4 (class 3 after October 1, 1977) felony. Upon conviction a public officer or employee would forfeit his office or employment. Ill.Rev.Stat., ch. 38, § 33-3. In addition, the failure to report a bribe is itself a Class A misdemeanor. *Id.*, § 33-2.

The Illinois Constitution also provides that the Governor may remove for incompetence, neglect of duty, or malfeasance in office any officer who may be appointed by the Governor. Ill. Const. (1970), Article V, § 10. Thus if Benson's revelations concerning Allphin came to the Governor's attention, Allphin and his right hand man Rummel would have both been out of jobs.

It is obvious from these circumstances that the cases relied upon by petitioners have no application whatsoever to this case. *Snepp v. United States*, 444 U.S. 507 (1980) concerned a former employee of the CENTRAL INTELLIGENCE AGENCY (CIA) who had agreed not to divulge CLASSIFIED information without authorization and not to publish any information relating to the CIA without prepublication clearance. This Court held that Snepp had violated a fiduciary obligation to the CIA when he published a book about CIA activities without prepublication review. *Snepp* is of no help to the petitioners in this case.

United States v. Marchetti, 466 F.2d 1309 (C.A. 4, 1972) also does not support petitioners' argument and in fact supports the Seventh Circuit. *Marchetti*, also concerned a former employee of the CIA and his attempts to publish information concerning the Agency. The Fourth Circuit found that the CIA secrecy agreement with Marchetti was constitutional and was not an illegal restraint in violation of the First Amendment. *Id.*, at 466 F.2d 1311.

However, the court did agree with Marchetti that the First Amendment precludes prior restraints with respect to information which is unclassified or officially disclosed. 466 F.2d 1313. The court there was concerned with SECRET information touching upon the national defense and the conduct of foreign affairs. The court here was concerned with information which Allphin and Rummel undoubtedly wanted kept secret, but which was neither secret nor classified in any legal sense. It was not even confidential in a legal sense.

The petitioners were not interested in protecting the confidentiality of DOR investigations or the integrity of individual files. They were desperate to protect themselves from a second round of criminal contempt charges and from possible indictments for their acts of official

misconduct. They were also interested in protecting their own jobs. Qualified immunity is not available as a defense in such circumstances.

The *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983) opinion is another former CIA employee case concerning SECRET information. It is inapplicable to this case except to the extent it recognized that a government employee's speech interest is entitled to more weight when he is speaking on a matter of general concern. The equal enforcement of the State's revenue laws and the honest administration of the DOR is of paramount importance to the people of the State of Illinois. If that agency is being corruptly managed, the people have a right to know and a duty to clean out the corruption.

The Seventh Circuit did not misapply the *Pickering* balancing test in this case. Its decision is in conformity with applicable case law. The fact of the matter is that the petitioners' have raised a false issue that is not supported by the record in this appeal. The actions of Allphin and Rummel went far beyond the "outer perimeter" of their "line of duty." *Barr v. Mateo*, 360 U.S. 564 (1959). Thev were not and are not now entitled to qualified immunity for their transgressions. Government officials cannot ignore with impunity the limitations which controlling law place upon their powers; they should be immune for actions only within the plain limits of their duties. *Butz v. Economou*, 438 U.S. 478 (1978).

Allphin and Rummel were not acting within the limits of their duties. They were engaged in acts of official misconduct and in an attempt to cover-up that misconduct by attacking Benson. There is no issue of whether there is an absolute right to disclose confidential information. The only issue is whether two corrupt State officials can obtain qualified immunity to shelter themselves from liability for violating Benson's First Amendment rights.

The jury found Allphin liable on Benson's claims and awarded $353,000.00 (A.6). The trial court specifically found that the jury's liability verdicts were reasonable (A.6; C.2). Rummel would undoubtedly have been found guilty as well if the trial court had not erroneously granted a directed verdict in his favor (A.23-24). (See *Benson v. Allphin and Rummel*, No. 86-27).

The foregoing reasons should be compelling to suggest to this Court to deny certiorari. The law was clearly established in 1976 that corrupt State officials who were engaged in acts of official misconduct and obstruction of justice were not authorized to retaliate against a former employee who exposed their corrupt activities to public scrutiny. Such officials cannot be permitted to prevail on the First Amendment claims of the former employee on the basis of qualified immunity or on any other basis.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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